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The Comparative Law Method and the European Court of Justice: Echoes Across the Atlantic†

The purpose of this contribution is to examine some salient applications of the comparative law method in the jurisprudence of the European Court of Justice in light of relevant case law of the U.S. Supreme Court involving recourse to foreign and international law in domestic constitutional adjudication. It is divided into three main parts. The first part concerns the European Court of Justice's recourse to the comparative law method in the context of the prohibition of discrimination on grounds of sexual orientation, highlighting parallels to the U.S. Supreme Court's decision in Obergefell v. Hodges. *The second part takes up the comparative law method in the context of the interpretation of EU law, focusing on the European Court of Justice's elaboration of the autonomous concepts of "spouse" and "marriage" and the potential implications for the mobility of same-sex couples in the EU, drawing insights from the U.S. Supreme Court's decisions in* United States v. Windsor *and* Obergefell. *The third part discusses the comparative law method in the context of the European Court of Justice's review of national and Union measures for compliance with EU fundamental rights, which invites comparisons with some recent U.S. Supreme Court cases on the incorporation doctrine and the standard of review. Altogether, the comparative reflections set forth in this contribution attest to similar challenges facing each Court in the context of constitutional adjudication and provide interesting insights into how the Courts carry out their mandates under their respective constitutional charters.*

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Introduction

This is a momentous time for reflection on the recourse to foreign and international law by the courts of the European Union and the United States. In the EU, the comparative law method is a settled practice employed by the European Court of Justice[1] since the founding of what was then the European Communities (now Union). This method denotes the ways in which the Union courts take account of the laws of the member states, as well as other sources of foreign and international law to varying degrees, for the purposes of ruling on matters of EU law in the cases brought before them.[2] Yet, over the past decade, renewed attention has been paid to the use of this method by the European Court of Justice[3] and the national (supreme and constitutional) courts in Europe,[4] in large part on account of the changes to the EU regime of fundamental rights protection that were brought about by the entry into force of the Lisbon Treaty,[5] namely with respect to the EU's envisaged

1. Under the first paragraph of Article 19(1) of the Consolidated Version of the Treaty on European Union, June 7, 2016, 2016 O.J. (C 202) 13 [hereinafter TEU], the institution of the Court of Justice of the European Union comprises the (European) Court of Justice (ECJ), General Court (EGC), and specialized courts (which used to include the EU Civil Service Tribunal (CST)), collectively referred to as the Union courts or Union judicature. Of note, on September 1, 2016, the CST was dissolved; first instance jurisdiction in disputes between the Union and its servants was transferred to the EGC, along with the seven posts of the Judges sitting at the CST. *See* Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 Amending Protocol No. 3 on the Statute of the Court of Justice of the European Union, 2015 O.J. (L 341) 14; Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the Transfer to the General Court of Jurisdiction at First Instance in Disputes Between the European Union and Its Servants, 2016 O.J. (L 200) 137 [hereinafter Regulation (EU, Euratom) 2016/1192].

2. The comparative law method may be utilized by the relevant Union court (as set out *supra* note 1) pursuant to its respective bases of jurisdiction under the EU treaties. The fact that focus is put on the ECJ may be explained, among other things, by virtue of its (so far exclusive) jurisdiction to deliver preliminary rulings and its appellate jurisdiction in respect of the EGC's decisions, which have afforded the basis for many rulings involving the comparative law method, especially with regard to fundamental rights and other general principles of EU law.

3. *See, e.g.*, Gráinne de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 20 Maastricht J. Eur. & Comp. L. 168 (2013); Christopher McCrudden, *Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared*, 15 Cambridge Y.B. Eur. Legal Stud. 383 (2012–2013) and citations therein. *See also* the present volume.

4. National courts outside the EU may also be taken into account. *See, e.g.*, Courts and Comparative Law (Mads Andenas & Duncan Fairgrieve eds., 2015); Highest Courts and Globalisation (Sam Muller & Sidney Richards eds., 2010); *Special Issue on Highest Courts and Transnational Interaction*, 8 Utrecht L. Rev., no. 2, 2012. With regard to interaction between the ECJ and the national courts, see also, e.g., Constitutional Conversations in Europe: Actors, Topics and Procedures (Monica Claes et al. eds., 2012).

5. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Lisbon Treaty]. For the most recent consolidations, see TEU, *supra* note 1; Consolidated Version of the Treaty on the Functioning of the European Union, June 7, 2016, 2016 O.J. (C 202) 47 [hereinafter TFEU]. For brevity's sake, references to former provisions of the EU or EC treaties are replaced in this Article by references to the current provisions of the TEU or TFEU.

accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[6] and the binding effects of the Charter of Fundamental Rights of the European Union (hereinafter the Charter).[7] In the United States, the debate between U.S. Supreme Court Justices Scalia and Breyer on the constitutional relevance of foreign court decisions,[8] as commemorated by this symposium, highlighted key issues concerning the potential utility, difficulties, and tensions associated with the reference to foreign and international law in domestic constitutional adjudication.[9] These issues continue to play out in various areas of U.S. Supreme Court case law,[10] some of which echoes the European Court of Justice's case law in this context.

In the United States, reference to the use of the comparative law method is generally considered to be synonymous with the use of foreign and international law.[11] Foreign law means the law of a country outside the United States, such as an EU member state, whereas international law denotes the law of international and supranational organizations, such as the EU in the sense of the treaties and other instruments of EU law within the Union legal order, as distinct from extra-EU legal instruments such as the ECHR, which the European Court of Human Rights is mandated to interpret. In the EU, however, the comparative law method has a special meaning, since it is focused on the laws of the member states. Thus, as compared to the American setting, in which the U.S. Supreme Court's recourse to sources of foreign and international law is typically

6. Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

7. TEU, *supra* note 1, art. 6(1)–(2). The Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364) 1, was reenacted by the European Parliament, Council, and Commission on the day that the Lisbon Treaty, *supra* note 5, was signed, and reprinted alongside the consolidated versions of the TEU and TFEU. For the current consolidation, see Consolidated Version of the Charter of Fundamental Rights of the European Union, June 7, 2016, 2016 O.J. (C 202) 389 [hereinafter Charter]. With the entry into force of the Lisbon Treaty, the Charter has the same legal value as the EU treaties, i.e., as primary Union law. *See* TEU, *supra* note 1, art. 6(1), first para. The EU's accession to the ECHR has not yet occurred. *See* Opinion 2/13, Accession of the EU to the ECHR, EUR-Lex CELEX 62013CV0002 (Dec. 18, 2014).

8. Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer on the Constitutional Relevance of Foreign Court Decisions, American University Washington College of Law (Jan. 13, 2005), https://www.wcl.american.edu/secle/founders/2005/050113.cfm [hereinafter Transcript]; *see also* Norman Dorsen, *A Conversation Between U.S. Supreme Court Justices*, 3 Int'l J. Const. L. 519 (2005).

9. As distinguished from situations in which foreign and international law are relevant through domestic norms. Regarding the reference to EU law and case law in U.S. Supreme Court jurisprudence in this latter sense, see, e.g., Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2803–04 (2011) (Ginsburg, J., dissenting); Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

10. Regarding the Eighth Amendment, see, e.g., Glossip v. Gross, 135 S. Ct. 2726 (2015) (Breyer, J., dissenting); Graham v. Florida, 560 U.S. 48 (2010). For other examples, see *infra* Parts I.B, II.B, III.B, and III.C.

11. Some commentators prefer umbrella terms such as "transnational law" to cover the two. *See, e.g.*, Vicki C. Jackson, Constitutional Engagement in a Transnational Era 10 (2010).

viewed as "external" to the domestic norms being interpreted, the comparative law method of the European Court of Justice centers on national norms that are "internal" to the Union legal order and that sustain the interpretation and formulation of EU law. This may help to explain in part why the stakes of the debate regarding the comparative law method in the EU are different from those in the United States, and ironically, the debate in the EU appears to be concerned with encouraging greater (and more transparent) recourse by the European Court of Justice to the rules, principles, and traditions of the member states, whereas in the United States it appears to be geared towards discouraging reference to foreign and international law by courts altogether.

The importance of the comparative law method in the Union legal order should not be underestimated. That method regularly informs the workings of the Union courts, and along the lines of Justice Breyer's remarks in the aforementioned debate,[12] it is just as relevant in the "less glamorous" cases that traverse all areas of EU law. As discussed elsewhere,[13] there are general and specific legal bases in the treaties authorizing the Union courts to use the comparative law method in situations involving the discovery and development of general principles of EU law (gap filling), the interpretation of rules and concepts of EU law (interpretation), and the review of the compatibility of national law with EU law or of Union measures with higher-ranking rules of EU law (compatibility review).[14] Accordingly, the comparative law method is an integral part of the dialogue between the European Court of Justice and the national courts, as well as of the relationship between the Union and the member states generally.[15] Moreover, since this method involves the Union courts looking to the laws of the member states (or other jurisdictions as the case may be)[16] as part of finding an appropriate solution in the particular case, it allows for a dynamic interpretation of

12. *See* Transcript, *supra* note 8.

13. *See, e.g.*, Koen Lenaerts & Kathleen Gutman, *The Comparative Law Method and the Court of Justice of the European Union: Interlocking Legal Orders Revisited*, *in* COURTS AND COMPARATIVE LAW, *supra* note 4, at 141 and citations therein.

14. To be sure, these situations are not airtight; for example, the Court's preliminary ruling jurisdiction on the interpretation of EU law indirectly determines whether a particular national rule is compatible with the provisions of EU law being interpreted. Moreover, these situations correspond to the functions played by general principles of EU law in the Union legal order. *See, e.g.*, Koen Lenaerts & José A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, 47 COMMON MKT. L. REV. 1629 (2010).

15. *See* Case C-62/14, Gauweiler v. Deutscher Bundestag, Opinion of Advocate General Cruz Villalón, EUR-Lex CELEX 62014CC0062, ¶ 61 (Jan. 14, 2015) (emphasizing the role of the constitutional traditions common to the member states in bringing about "the basic convergence of the common constitutional identity of the Union and that of each of the Member States").

16. Of note, U.S. law and case law appear in a wide variety of advocate general opinions and may be brought to the attention of the Union courts by other means. *See* Lenaerts & Gutman, *supra* note 13, at 145–49 and citations therein. To date, however, they have not explicitly figured in the operative parts or reasoning of the Union courts in their judgments.

EU law that takes account of and adjusts to societal changes taking place at the national and Union levels.

Following from these remarks, the purpose of this contribution is to examine some salient applications of the comparative law method in the jurisprudence of the European Court of Justice in light of relevant case law of the U.S. Supreme Court involving recourse to foreign and international law in domestic constitutional adjudication. It is divided into three parts, which largely correspond to the key situations mentioned above—gap filling, interpretation, and compatibility review—in which the comparative law method arises in the European Court of Justice's case law. The first part concerns the Court's recourse to the comparative law method in the context of the prohibition of discrimination on grounds of sexual orientation, highlighting parallels with the U.S. Supreme Court's decision in *Obergefell v. Hodges*.[17] The second part takes up the comparative law method in the context of the interpretation of EU law, focusing on the Court's elaboration of the autonomous concepts of "spouse" and "marriage" and the potential implications for the mobility of same-sex couples in the EU, drawing insights from the U.S. Supreme Court's decisions in *United States v. Windsor*[18] and *Obergefell*. The third part discusses the comparative law method in the context of the Court's review of national and Union measures for compliance with EU fundamental rights, which invites comparisons with some recent U.S. Supreme Court cases on the incorporation doctrine and the standard of review.

This contribution does not claim to be comprehensive or exhaustive. As just alluded to, there is a voluminous (and ever-increasing) body of scholarly literature and jurisprudence of the European Court of Justice and the U.S. Supreme Court bearing on the recourse to foreign and international law,[19] and even the cases that are mentioned in this contribution cannot be treated in depth. Still, the comparative reflections set forth in this contribution provide some "food for thought," in Justice Breyer's words,[20] which helps to enrich the transatlantic judicial conversation between the European Court of Justice and the U.S. Supreme Court, notwithstanding the differences in institutional framework and judicial architecture bearing on the function of each Court and the tasks entrusted to them under their respective constitutional charters.

I. Discovery and Development of General Principles of EU Law

Within the extensive case law involving the European Court of Justice's discovery and development of general principles of EU law

17. 135 S. Ct. 2584 (2015).
18. 133 S. Ct. 2675 (2013).
19. Akin to the comparative law method applied by the ECJ, the literature indicates that the reference to foreign and international law in U.S. Supreme Court case law is a long-standing practice. *See, e.g.*, International Law in the U.S. Supreme Court: Continuity and Change (D.L. Sloss et al. eds., 2011); Sarah H. Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1 (2006).
20. *See* Transcript, *supra* note 8.

on the basis of the comparative law method,[21] its jurisprudence on the prohibition of discrimination on grounds of sexual orientation stands out because it highlights the dynamic nature of the comparative law method and invites comparison with the U.S. Supreme Court's judgment in *Obergefell v. Hodges*.[22]

A. Prohibition of Discrimination on Grounds of Sexual Orientation

In *Grant*,[23] decided in 1998, the European Court of Justice held that Community (now Union) law, as it stood at the time, did not cover discrimination based on sexual orientation involving a person in a stable relationship with a person of the same sex.[24] It also ruled, on the basis of a comparative analysis of the laws of the member states,[25] that in the present state of what was then Community law, stable relationships between two persons of the same sex were not to be regarded as equivalent to marriage or to stable relationships between persons of the opposite sex, with the result that an employer was not required by Community law to treat the situation of a person who had a stable relationship with a partner of the same sex as equivalent to that of a person who is married to, or has a stable relationship outside marriage with, a partner of the opposite sex.[26] It added, however, that "it is for the legislature alone to adopt, if appropriate, measures which may affect that position."[27]

Indeed, as the Court acknowledged in that judgment,[28] the Amsterdam Treaty entered into force the following year and introduced what is now Article 19 of the Treaty on the Functioning of the European Union (TFEU), conferring competence on the Union legislature to adopt measures to combat various forms of discrimination, including that based on sexual orientation.[29] One of the Union measures adopted under this provision is Directive 2000/78,[30] which establishes a general framework for equal treatment in employment and occupation. The Court's interpretation of this Directive has

21. For a general discussion and survey of general principles of EU law in the Union legal order, see, e.g., KOEN LENAERTS & PIET VAN NUFFEL, EUROPEAN UNION LAW 825–61 (Robert Bray & Nathan Cambien eds., 3d ed. 2011).

22. 135 S. Ct. 2584 (2015).

23. Case C-249/96, Grant v. South-West Trains Ltd., 1998 E.C.R. I-621.

24. *Id.* at 651 (¶ 47).

25. *Id.* at 647 (¶ 32). The ECJ also examined decisions of the European Court (and Commission) of Human Rights. *See id.* at 647–48 (¶¶ 33–34).

26. *Id.* at 648 (¶ 35).

27. *Id.* (¶ 36).

28. *Id.* at 651 (¶ 48).

29. *See* TFEU, *supra* note 5, art. 19(1). The Nice Treaty, Mar. 10, 2001, 2001 O.J. (C 80) 1, added a second paragraph—now TFEU art. 19(2).

30. Council Directive 2000/78/EC of Nov. 27, 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16. For broader comparative discussion, see, e.g., Gráinne de Búrca, *The Trajectories of European and American Antidiscrimination Law*, 60 AM. J. COMP. L. 1 (2012); Katerina Linos, *Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union*, 35 YALE J. INT'L L. 115 (2010).

produced a steady stream of cases affording protection against discrimination for same-sex couples.[31]

For example, in *Maruko*,[32] the Court received a reference for a preliminary ruling from a German court involving a same-sex life partner whose request for a survivor's benefit had been rejected on the grounds that the national regulations only extended such benefits to surviving spouses. It held that Directive 2000/78 precludes national rules under which a surviving life partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, "even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses" as regards that benefit.[33] The Court left it to the national court to determine whether a surviving life partner is in a comparable situation to that of a spouse who is entitled to the survivor's benefit, but it underlined that if the national court made such a finding, the national rules at issue would constitute direct discrimination within the meaning of the Directive.[34]

Thereafter, in *Römer*,[35] the Court received a similar reference from another German court, this time involving a situation in which the applicant was denied the greater supplementary retirement pension given to married persons on account of his registered life partnership status. It ruled that Directive 2000/78 precludes national rules in which a pensioner in a registered life partnership receives a lower supplementary retirement pension than that granted to a married pensioner, provided that in the member state concerned, marriage is reserved to persons of different gender, whereas persons of the same gender only have access to a registered life partnership.[36] It found that there is in fact direct discrimination on grounds of sexual orientation because, under national law, the life partner is in a legal and factual situation comparable to that of a married person as regards that pension, although the Court again left it to the national court to assess comparability in light of the benefit in question.[37]

Of note, in his opinion in *Römer*, Advocate General Jääskinen considered, in the context of providing a comprehensive analysis of the referring court's questions,[38] that the prohibition of

31. *See also, e.g.*, Joined Cases C-124/11, C-125/11 & C-143/11, Bundesrepublik Deutschland v. Dittrich, EUR-Lex CELEX 62011CJ0124 (Dec. 6, 2012). For detailed discussion, see, e.g., Geert De Baere & Kathleen Gutman, *The Impact of the European Union and the European Court of Justice on European Family Law*, *in* 1 THE IMPACT OF INSTITUTIONS AND ORGANISATIONS ON EUROPEAN FAMILY LAW 5 (Jens M. Scherpe ed., 2016).

32. Case C-267/06, Maruko v. Versorgungsanstalt der deutschen Bühnen, 2008 E.C.R. I-1757.

33. *Id.* ¶ 73. *See generally id.* ¶¶ 65–73.

34. *Id.* ¶ 72.

35. Case C-147/08, Römer v. Freie und Hansestadt Hamburg, 2011 E.C.R. I-3591.

36. *Id.* at 3666 (¶ 52).

37. *Id.*

38. In its fourth question, the referring court asked whether, if it was not established that the national rules infringed Directive 2000/78, such rules infringed Article 157 TFEU or a general principle of EU law. *See* Case C-147/08, *Römer*, Opinion of Advocate General Jääskinen, 2011 E.C.R. at I-3626 (¶¶ 114–16).

discrimination on grounds of sexual orientation should be regarded as a general principle of EU law.[39] The Court found it unnecessary to give an answer to that question in its judgment.[40] Thus, it remains to be seen how it may rule on that issue in future case law. That said, the Court's approach in *Mangold*[41] (especially in juxtaposition with *Akzo Nobel)*[42] would appear to provide strong arguments for such recognition.[43] Along the lines of the Court's declaration of the general principle of nondiscrimination on grounds of age in *Mangold*, a principle of nondiscrimination on the basis of sexual orientation is consistent with a specific task conferred on the EU in combating discrimination (Article 19 TFEU),[44] has been given specific expression by the Union legislature (Directive 2000/78), and mirrors a recent trend in the protection of fundamental rights at the Union level (Article 21 of the Charter).

Recently, in *Hay*,[45] the Court received a reference from the French Court of Cassation that essentially asked whether Directive 2000/78 precludes a provision in a collective agreement under which an employee who concludes a civil solidarity pact (PACS) with a person of the same sex is not allowed to obtain the same benefits as those granted to married employees, *in casu* days of special leave and a salary bonus, where the national rules concerned do not allow persons of the same sex to marry.[46] First, regarding the existence of direct discrimination, the Court held—this time performing the comparability exercise itself—that persons of the same sex who cannot enter into marriage and therefore conclude a PACS are in a situation comparable to that of couples who marry as regards benefits related to pay or working conditions, such as those at issue in the proceedings.[47] Furthermore, with respect to the very existence of discrimination, the Court declared, on the basis of *Maruko* and *Römer*, that rules of a member state that restrict pay- or work-related benefits to married employees constitute direct discrimination based on sexual orientation against homosexual permanent employees in a PACS

39. *Id.* at 3628–30 (¶¶ 125–31). *See also* Case C-528/13, Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes, Opinion of Advocate General Mengozzi, EUR-Lex CELEX 62013CC0528, ¶ 45 n.55 (July 17, 2014).

40. Case C-147/08, *Römer*, 2011 E.C.R. at I-3670 (¶ 65).

41. Case C-144/04, Mangold v. Helm, 2005 E.C.R. I-9981.

42. *See* Case C-550/07 P, Akzo Nobel Chems. Ltd. v. Comm'n, Opinion of Advocate General Kokott, 2010 E.C.R. I-8301 at 8333 (¶¶ 95–96).

43. *See* Lenaerts & Gutman, *supra* note 13, at 160–67.

44. *See also* TFEU, *supra* note 5, art. 10 (one of the so-called horizontal clauses introduced by the Lisbon Treaty: "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.").

45. Case C-267/12, Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres, EUR-Lex CELEX 62012CJ0267 (Dec. 12, 2013). The ECJ delivered its judgment without an advocate general opinion, as provided for cases raising "no new point of law," under the fifth paragraph of Article 20 of the Statute of the Court of Justice of the European Union, *being the* Consolidated Version of Protocol (No. 3), annexed to the TEU, TFEU, and EAEC Treaty, June 7, 2016, 2016 O.J. (C 202) 210, *as amended most recently by* Regulation (EU, Euratom) 2016/1192, *supra* note 1.

46. Case C-267/12, *Hay*, ¶ 25.

47. *Id.* ¶¶ 35–37.

arrangement who are in a comparable situation.[48] The fact that the PACS, unlike the registered life partnership at issue in the earlier cases, was not restricted only to homosexual couples was irrelevant and did "not change the nature of the discrimination against homosexual couples who, unlike heterosexual couples, could not, on the date of the facts in the main proceedings, legally enter into marriage."[49] The difference in treatment based on the employees' marital status, and not expressly on their sexual orientation, was still direct discrimination because only persons of different sexes could marry and homosexual employees were therefore unable to meet the condition required for obtaining the benefit claimed.[50] In this way, the Court took a strong position in *Hay* for ensuring equal protection for same-sex couples.

B. Echoes of Obergefell v. Hodges

In *Obergefell v. Hodges*,[51] the U.S. Supreme Court[52] held that the Fourteenth Amendment[53] requires states, first, to license same-sex marriages and, secondly, to recognize same-sex marriages validly performed out-of-state.[54] Four members of the Court dissented, emphasizing among other things that this was a matter for the states to decide through the democratic process.[55] References to foreign sources were sprinkled throughout the judgment (as well as the oral arguments), generally in the dissenters' discussion of the traditional conception of marriage as being between a man and a woman, as part of their refutation of a fundamental right to marry for same-sex couples under the Fourteenth Amendment.[56]

Indeed, regarding the first issue, the majority of the Supreme Court declared that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal

48. *Id.* ¶ 41.
49. *Id*. ¶ 43.
50. *Id.* ¶ 44.
51. 135 S. Ct. 2584 (2015). For detailed discussion of this case and related precedents, see, e.g., Symposium, 6 CALIF. L. REV. CIR. 107 (2015); Symposium, *FORUM Perspectives on Marriage Equality and the Supreme Court*, 84 FORDHAM L. REV.1 (2015). *See also infra* note 64.
52. Justice Kennedy delivered the opinion of the Court, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Chief Justice Roberts and Justices Scalia, Thomas, and Alito issued dissenting opinions.
53. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").
54. The case involved proceedings in four states (Michigan, Kentucky, Ohio, and Tennessee) that defined marriage as a union between a man and a woman. *See Obergefell*, 135 S. Ct. at 2593.
55. *See, e.g.*, *id.* at 2611 (Roberts, C.J., dissenting); *id.* at 2626 (Scalia, J., dissenting) (filing separate dissent "to call attention to this Court's threat to American democracy").
56. *See, e.g.*, *id.* at 2612 (Roberts, C.J., dissenting); *id.* at 2630 (Scalia, J., dissenting); *id.* at 2640 (Alito, J., dissenting). *See also* Zachary D. Kaufman, *From the Aztecs to the Kalahari Bushmen: Conservative Justices' Citation of Foreign Sources: Consistency, Inconsistency, or Evolution?*, YALE J. INT'L L. ONLINE (2015), https://campuspress.yale.edu/yjil/files/2012/09/kaufman-macro-proof-07-31-15-1ca947b.pdf.

Protection Clauses of the Fourteenth Amendment, same-sex couples cannot be deprived of that right and that liberty.[57] It considered that the fundamental liberties protected by the Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs, among them the right to marry.[58] It then enumerated four principles and traditions demonstrating that the right to marry applies with equal force to same-sex couples.[59] The majority also found that the right of same-sex couples to marry derives from the Equal Protection Clause, explaining that the two clauses are "connected in a profound way, though they set forth independent principles."[60] In the case of same-sex marriage, it held: "It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. . . . [S]ame-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right."[61]

On the second issue, regarding whether the U.S. Constitution requires states to recognize same-sex marriages performed out-of-state, the Court reasoned that since it held, in this case, that same-sex couples may exercise the fundamental right to marry in all states, it followed that there was no lawful basis for a state to refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character.[62] In doing so, it stressed the instability and uncertainty caused by the present state of affairs:

> For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.[63]

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57. *Obergefell*, 135 S. Ct. at 2604.

58. *Id.* at 2597–98.

59. *Id.* at 2599–2602. In brief, the principles are: (1) "the right to personal choice regarding marriage is inherent in the concept of individual autonomy"; (2) marriage "supports a two-person union unlike any other in its importance to the committed individuals"; (3) marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education"; and (4) the "Court's cases and the Nation's traditions make clear that marriage is a keystone of [the American] social order."

60. *Id.* at 2602–03.

61. *Id.* at 2604.

62. *Id.* at 2607–08. The Court's decision effectively overturned section 2 of the Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C (though it was not explicitly mentioned therein), which provided:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

63. *Obergefell*, 135 S. Ct. at 2607.

Leaving aside the recognition issue for the moment, a prominent aspect of *Obergefell* (especially to European eyes) is the Supreme Court's "fundamental rights" reasoning based on the combined force of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as its repeated emphasis on dignity for same-sex couples.[64] It also draws attention to certain limitations associated with resting on grounds of equal protection, or equal treatment, alone, such as those relating to the fulfillment of the comparability exercise and the potential leveling down of protection across the board. These points have resonance for the EU framework addressing discrimination on grounds of sexual orientation, and may in turn prompt discussion of other normative sources of EU law providing protection in this regard, which leads to the next Part.

II. Interpretation of EU Law

In the context of the interpretation of EU law, the European Court of Justice may resort to the comparative law method when the EU norm in question does not provide a solution to the problem. On the one hand, that method may reveal a solution common to the laws of the member states, which is then taken up for the interpretation of the EU rules concerned.[65] On the other hand, that method may reveal divergences among the laws of the member states, which afford the basis for the Court to establish an autonomous EU interpretation of rules or concepts. This intersects with judicial lawmaking, since in the course of interpreting EU law, the Court may be faced with formulating judge-made rules of Union law, or what may be called "European federal common law."[66] Notable examples are the Court's elaboration of the concepts of "spouse" and "marriage" in *Reed*[67] and *D and Sweden v. Council*,[68] respectively, because they further illustrate the evolving nature of the comparative law method and invite comparisons with the U.S. Supreme Court's decision in *United States v. Windsor*,[69] which in combination with *Obergefell*

64. *See, e.g.*, Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 Harv. L. Rev. F. 16 (2015); Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 Harv. L. Rev. 147 (2015). For a broader discussion of dignity, see also, e.g., Luís Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. Int'l & Comp. L. Rev. 331 (2012); Judith Resnik, *Constructing the 'Foreign': American Law's Relationship to Non-Domestic Sources*, *in* Courts and Comparative Law, *supra* note 4, at 437, 441–46 and citations therein.

65. A classic example is Case 155/79, *AM & S Europe Ltd. v. Commission*, 1982 E.C.R. 1575, concerning the concept of legal professional privilege (attorney–client privilege in American parlance) under the EU competition rules. It was recently revisited in Case C-550/07 P, *Akzo Nobel Chemicals Ltd. v. Commission*, 2010 E.C.R. I-8301, in which the ECJ rejected the extension of this concept to communications with in-house lawyers.

66. Koen Lenaerts & Kathleen Gutman, *"Federal Common Law" in the European Union: A Comparative Perspective from the United States*, 54 Am. J. Comp. L. 1, 9 (2006).

67. Case 59/85, Netherlands v. Reed, 1986 E.C.R. 1283.

68. Joined Cases C-122/99 P & C-125/99 P, D & Sweden v. Council, 2001 E.C.R. I-4319.

69. 133 S. Ct. 2675 (2013).

v. Hodges[70] has reverberations for the mobility of same-sex couples in the EU.

A. *The European Court of Justice's Formulation of the Autonomous Concepts of "Spouse" and "Marriage"*

Reed,[71] decided in 1986, turned on the issue of whether an unmarried British citizen cohabiting with another British citizen of the opposite sex for several years fell within the definition of "spouse" under Article 10(1)(a) of Regulation No. 1612/68.[72] As the Regulation did not define this concept, it fell to the European Court of Justice, in a reference for a preliminary ruling from the Dutch Supreme Court, to decide whether the concept included unmarried cohabitants. The Court considered that "any interpretation of a legal term on the basis of social developments must take into account the situation in the whole Community [now Union], not merely one Member State."[73] Heeding Advocate General Lenz's opinion indicating the variations among the national traditions,[74] the Court ruled: "In the absence of any indication of a general social development which would justify a broad construction, and in the absence of any indication to the contrary in the Regulation, it must be held that the term 'spouse' in Article 10 of the Regulation refers to a marital relationship only."[75]

Thereafter, in its 2001 judgment in *D and Sweden v. Council*,[76] the Court formulated an EU concept of "marriage" in the context of a staff case[77] involving the Council's rejection of an official's request to treat his same-sex relationship as equivalent to marriage in order to obtain certain benefits under the Staff Regulations. In his opinion, Advocate General Mischo considered that, in light of *Reed*, "the definition of marriage includes only traditional marriage between two people of the opposite sex."[78] He also pointed out that the Union

70. 135 S. Ct. 2584 (2015).

71. Case 59/85, *Reed*.

72. Articles 10 and 11 of Council Regulation (EEC) No. 1612/68 of 15 October 1968 on Freedom of Movement for Workers Within the Community, 1968 O.J. (L 257) 475, were repealed and replaced by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States Amending Regulation (EEC) No 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004 O.J. (L 158) 77 [hereinafter Directive 2004/38/EC]. *See also* Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on Freedom of Movement for Workers Within the Union, 2011 O.J. (L 141) 1.

73. Case 59/85, *Reed*, 1986 E.C.R. at 1300 (¶ 13).

74. *See id.*, Opinion of Advocate General Lenz, at 1294.

75. *Id.*, Judgment of the Court, at 1300 (¶ 15).

76. Joined Cases C-122/99 P & C-125/99 P, D & Sweden v. Council, 2001 E.C.R. I-4319.

77. "Staff cases" are disputes between the Union and its servants. *See* TFEU, *supra* note 5, art. 270; *see also supra* note 1. For detailed discussion, see, e.g., Koen Lenaerts, Ignace Maselis & Kathleen Gutman, EU Procedural Law 665–85 (Janek Tomasz Nowak ed., 2015).

78. Joined Cases C-122/99 P & C-125/99 P, *D & Sweden*, Opinion of Advocate General Mischo, 2001 E.C.R. at I-4329–30 (¶ 48).

legislature had expressly decided not to adopt Sweden's request to modify the Staff Regulations to assimilate same-sex registered partnerships with marriage, but instead to engage in further study of the matter.[79] These points filtered into the Court's judgment upholding the General Court's interpretation of the Staff Regulations.[80] The Court held that "according to the definition generally accepted by the Member States, the term 'marriage' means a union between two persons of the opposite sex."[81] Although an increasing number of member states had "introduced, alongside marriage, statutory arrangements granting legal recognition to various forms of union between partners of the same sex or of the opposite sex and conferring on such unions certain effects which . . . are the same as or comparable to those of marriage," it found that "apart from their great diversity, such arrangements for registering partnerships between couples not previously recognised in law are regarded in the Member States as being distinct from marriage."[82] Accordingly, the Court formulated an EU concept of "marriage" in line with the national legal systems and with the Union legislature's intention not to effect changes to the Staff Regulations in this regard.[83]

B. Echoes of United States v. Windsor

United States v. Windsor[84] provides an apt comparison. In this case, the U.S. Supreme Court[85] declared section 3 of the Defense of Marriage Act (DOMA)[86] unconstitutional under the Fifth Amendment of the U.S. Constitution.[87] Section 3 of DOMA provided that for the purposes of federal law, "the word 'marriage' means only

79. *Id.* at 4330 (¶¶ 51–53).

80. *Id.*, Judgment of the Court, at 4356 (¶ 48). Among other pleas submitted, the Court rejected the applicants' plea regarding infringement of the principle of equal treatment, finding that the situation of an official in a registered partnership was not comparable to that of a married official, taking into account the existing situation in the member states reflecting the absence of any general assimilation of marriage and other forms of statutory union. *Id.* at 4356–57 (¶¶ 47–52). The Court also rejected a plea based on the right to respect for private and family life under Article 8 of the ECHR (no mention was made of Article 7 of the Charter in this regard). *Id.* 4358–59 (¶¶ 58–61). Another plea relating to the restriction of the free movement rules was submitted too late and thus declared inadmissible. *Id.* at 4357–58 (¶¶ 53–57).

81. *Id.* at 4353 (¶ 34).

82. *Id.* at 4353–54 (¶¶ 35–36).

83. *Id.* at 4354 (¶¶ 37–38).

84. 133 S. Ct. 2675 (2013). For detailed discussion, see, e.g., Symposium, *The Supreme Court's Treatment of Same-Sex Marriage in* United States v. Windsor *and* Hollingsworth v. Perry: *Analysis and Implications*, 64 Case W. Res. L. Rev. 823 (2014); *see also supra* note 51.

85. Justice Kennedy delivered the opinion of the Court, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan; Chief Justice Roberts and Justices Scalia and Alito issued dissenting opinions, the latter two of which Justice Thomas joined in all and in part, respectively.

86. 1 U.S.C. § 7. DOMA's other operative provision, section 2, was not challenged in this case, but was later overturned in *Obergefell*. *See supra* note 62.

87. The opinion also dealt with jurisdictional issues. *See Windsor*, 133 S. Ct. at 2684–89.

a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[88] These definitions were controlling for over 1,000 federal laws,[89] including the federal tax rules that prompted the dispute. Here, although the applicant's same-sex marriage was lawfully recognized under New York law, she was barred from claiming an estate tax exemption by virtue of DOMA's exclusion of a same-sex partner from the definition of "spouse."[90] Although *Windsor* dealt with a challenge to the federal definition of marriage, it proved to be the precursor to the challenge to state marriage definitions affecting same-sex couples in *Obergefell,* as forewarned by certain dissenters on the Court.[91]

In its opinion, the *Windsor* majority found that section 3 of DOMA was unconstitutional as a deprivation of liberty protected by the Fifth Amendment's Due Process Clause,[92] which contains within it the prohibition against denying to any person the equal protection of the laws.[93] It stressed that DOMA's "avowed purpose and practical effect are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[94] In short, DOMA frustrated New York's objective of eliminating inequality by "writ[ing] inequality into the entire United States Code."[95] It deprived some couples married under the laws of their state, but not others, of both rights and responsibilities, creating two contradictory marriage regimes within the same state. It also forced same-sex couples to live as married for the purpose of state law, but unmarried for the purpose of federal law, thereby diminishing the stability and predictability of the basic personal relations the state protects.[96]

In his dissent, Chief Justice Roberts stressed that the interests of uniformity and stability justified Congress's decision to retain the definition of marriage that "at that point, had been adopted by every State in our Nation, and every nation in the world."[97] This was seconded by Justice Scalia, who pointed out that there were several valid rationales for the legislation.[98] In

88. Pub. L. 104–199, § 3(1), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7).
89. *Windsor*, 133 S. Ct. at 2683.
90. *Id.* at 2683–84.
91. *See id.* at 2696–97 (Roberts, C.J., dissenting); *id.* at 2709–10 (Scalia, J., dissenting). The companion case decided on the same day, *Hollingsworth v. Perry*, 133 S. Ct. 2651 (2013), concerning Proposition 8, a voter-enacted ballot initiative that amended the California Constitution to provide that only marriage between a man and a woman was valid and hence eliminated the right for same-sex couples to marry, was dismissed on standing grounds.
92. U.S. CONST. amend. V ("[N]or [shall any person] be deprived of life, liberty, or property, without due process of law . . . .").
93. *Windsor*, 133 S. Ct. at 2693–95.
94. *Id.* at 2693.
95. *Id.* at 2694.
96. *Id.*
97. *Id.* at 2696 (Roberts, C.J., dissenting).
98. *Id.* at 2707–08 (Scalia, J., dissenting).

addition, Justice Alito's dissenting opinion contained references to foreign sources in the context of challenging the due process grounds of the opinion, underlining that "the right to same-sex marriage is not deeply rooted in this Nation's history and tradition . . . [nor] in the traditions of other nations . . . [since n]o country allowed same-sex couples to marry until the Netherlands did so in 2000."[99]

C. Potential Implications for the Mobility of Same-Sex Couples

Since *Reed* and *D and Sweden v. Council* were decided, the political and legal circumstances have evolved considerably at the national and Union levels. At the Union level, the Staff Regulations have been amended, with the result that certain benefits previously reserved for married officials are now also available to officials in a registered partnership provided that certain conditions are satisfied.[100] One of these conditions is that "the couple has no access to legal marriage in a Member State."[101] Therefore, where same-sex couples have access to legal marriage, in principle they cannot claim benefits under a registered partnership.[102] This suggests that the Staff Regulations recognize same-sex marriage legally contracted under the law of a member state; where this is not possible, same-sex couples in a registered partnership may claim benefits. Under these circumstances, the concept of "marriage" elaborated by the Court in *D and Sweden v. Council* appears to have been superseded by the Union legislature.[103]

At the national level, member states have increasingly recognized same-sex marriage and other types of civil unions (as acknowledged in *Obergefell* and *Windsor*), raising the question of whether the European Court of Justice may be inclined to reconsider its position in future case law. This is especially true with regard to the concept of "spouse" in Article 2(2)(a) of Directive 2004/38[104] on the free movement and residence rights of Union citizens and their family members. The concept was left undefined despite the European Parliament's efforts to indicate explicitly in the text that it applies to same-sex spouses.[105] This issue relates to the mobility of same-sex couples in terms of obstacles that arise when they move to a member state where their civil union or same-sex marriage is not

99. *Id.* at 2715 (Alito, J., dissenting).

100. Council Regulation (EC, Euratom) No. 723/2004 of 22 March 2004 Amending the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the European Communities, 2004 O.J. (L 124) 1. *See also* Consolidated Version of the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union, EUR-Lex CELEX 01962R0031-20160910 [hereinafter Staff Regulations].

101. Staff Regulations, *supra* note 100, art. 1d(1) & Annex VII, art. 1(2)(c).

102. *But see, e.g.*, Case F-86/09, W v. Comm'n, EUR-Lex CELEX 62009FJ0086 (Oct. 14, 2010) (interpreting the condition of no prior access to marriage flexibly).

103. Koen Lenaerts, *Federalism and the Rule of Law: Perspectives from the European Court of Justice*, 33 FORDHAM INT'L L.J. 1338, 1357–58 (2011).

104. Directive 2004/38/EC, *supra* note 72.

105. *See, e.g.*, Lenaerts & Gutman, *supra* note 66, at 54 and citations therein.

recognized,[106] and it is therefore likely to come before the Union judicature in the future, whether in respect of Directive 2004/38 or another context.[107] This issue also illustrates the "pervasive effects" of EU law, in the sense that while in principle the member states have primary competence concerning the definition and legal effects of marriage and other forms of civil union, they must exercise such competence in compliance with EU law, including the free movement rules.[108] Certainly, it is an extremely sensitive matter, and much will depend on the circumstances of the particular case. If (or when) the Court is faced with this issue under Directive 2004/38, it may choose to interpret the concept of "spouse" in reference to national law—either under the state of origin principle, thereby in accordance with the law of the member state where the marriage took place, or under the host state principle, as was done for the term "registered partnership"[109]—or to formulate an autonomous EU concept of "spouse"; for example, choosing to exclude same-sex marriage from the scope of the Directive would establish uniformity and legal certainty, but would be apt to create inequalities reminiscent of *Windsor*.

In this regard, *D and Sweden v. Council* may be distinguished on several grounds. First, that case involved the Court's formulation of a concept of marriage in a field of exclusive competence of the Union (the Staff Regulations), which may help to explain why the Court based its decision in part on the prevailing views of the member states taken as a whole. Secondly, the Court did not have the opportunity to examine the issue from the perspective of free movement, and its discussion of fundamental rights was limited.[110] In contrast, pursuant to the free movement provisions of the treaties on which it is based, Directive 2004/38 must be interpreted with a view to facilitating the free movement of persons, and any justifications of the member state concerned would have to be applied in compliance with fundamental rights as indicated in Recital 31 of the Directive, which mentions the prohibition of discrimination on grounds of sexual orientation that is enshrined in Article 21 of the Charter.[111] In fact, depending on the case, it is conceivable that other fundamental rights guaranteed by the Charter may come into play,[112] such as

106. For detailed discussion, see, e.g., Alina Tryfonidou, *EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition*, 21 COLUM. J. EUR. L. 195 (2015).

107. *See, e.g.*, Case C-459/14, Cocaj v. Bevándorlási és Állampolgársági Hivatal, 2015 O.J. (C 7) 12 (removed from the register by Order of the President of the Second Chamber of the Court (July 16, 2015)). *See also, e.g.*, Notices of the European Union, Question for Written Answer E-001972/14 to the Commission, *Right of Free Movement and Legal Problems for LGBT Individuals* (Ole Christensen, Feb. 20, 2014), 2014 O.J. (C 317) 54. Of note, there is a pending case before the European Court of Human Rights on the matter. *See* Orlandi v. Italy, App. No. 26431/12, http://hudoc.echr.coe.int/eng?i=001-139934 (communicated Dec. 3, 2013).

108. Lenaerts, *supra* note 103, at 1339–41, 1355–61.

109. Directive 2004/38/EC, *supra* note 72, art. 2(2)(b).

110. *See* discussion *supra* note 80.

111. *Supra* note 7.

112. As compared to Article 12 of the ECHR, *supra* note 6 ("Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercising of this right."), Article 9 of the Charter ("The

Article 1 on the right to respect for human dignity and Article 7 on the right to respect for private and family life; both of these provisions were explicitly emphasized by the Court in a recent case concerning the interpretation of certain Union measures relating to the assessment of asylum applications of third-country nationals based on fear of persecution on account of their homosexuality.[113]

Furthermore, there are strong arguments, based on an analogous reading of the Court's judgments interpreting other provisions of EU law, that a change in status of incoming same-sex couples may be deemed an obstacle to free movement. For instance, in *Grunkin*,[114] the Court held that Article 21 TFEU precludes national authorities from refusing to recognize a child's surname as determined and registered in a second member state where the child, who has only the nationality of the first member state, was born and has resided since birth.[115] The Court found that having to use a surname in the member state of which the person is a national that is different from that conferred and registered in the member state of birth and residence is liable to cause "serious inconvenience." This is because every time the surname is used in a specific situation that does not correspond to that on the document submitted as proof of a person's identity, *inter alia*, with a view to obtaining entitlements of some sort, the difference in surnames is likely to give rise to doubts as to the person's identity and the authenticity of the documents submitted or the veracity of their content.[116]

Similar arguments may be made about the "serious inconvenience" experienced by same-sex couples in this context, thereby echoing the U.S. Supreme Court's holding in *Obergefell*, which pointed to the problems caused by the failure of states to recognize same-sex marriages lawfully performed out-of-state.[117]

III. Compatibility Review and Fundamental Rights Adjudication

The European Court of Justice's recourse to the comparative law method has assumed renewed importance in the context of its assessment of the compatibility of national and Union measures

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right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.") was

> modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides.

Explanations Relating to the Charter of Fundamental Rights, 2007 O.J. (C 303) 17, 21 (Explanation on Article 9).

113. Joined Cases C-148/13 to C-150/13, A v. Staatssecretaris van Veiligheid en Justitie, EUR-Lex CELEX 62013CJ0148, ¶¶ 53–54, 65–65, 72 (Dec. 2, 2014).

114. Case C-353/06, Grunkin v. Standesamt Niebüll, 2008 E.C.R. I-7639.

115. *Id.* ¶ 39.

116. *Id.* ¶¶ 21–28. The national legislation could not be justified on the grounds alleged in the proceedings, *id.* ¶¶ 29–37, although the ECJ noted that no specific reason was put forward that could preclude recognition of the child's surname, for instance as contrary to the public policy of the member state concerned, *id.* ¶ 38.

117. *See supra* text accompanying note 63.

with EU fundamental rights. The compatibility of national measures in this regard implicates discussion of the scope of application of the Charter and the U.S. Supreme Court's recent decision in *McDonald v. Chicago*[118] on the incorporation doctrine. The compatibility of Union measures with the Charter also illuminates some interesting parallels with the U.S. Supreme Court case *Ysursa v. Pocatello Education Association*[119] on the standard of review.

A. Member State Measures and the Scope of Application of the Charter

In principle, the convergence of national solutions in relation to the EU regime of fundamental rights is embodied in the Charter, which, as indicated in its Preamble, reaffirms fundamental rights as they result from, *inter alia*, the "constitutional traditions and international obligations common to the Member States."[120] At present, one of the key issues concerning the Charter is its scope of application vis-à-vis the member states,[121] which invites comparison with the American incorporation doctrine. As alluded to in Advocate General Sharpston's opinion in *Ruiz Zambrano*,[122] the Charter is basically the opposite of this doctrine, since pursuant to Article 51, it applies to the member states "only when they are implementing Union law."[123] If this is the case, in essence, the "last word" falls to the Union courts, whereas if it is not the case, the "last word" falls to the national (constitutional or supreme) courts—that is to say, the member states. This issue draws attention to the comparative law method used by the European Court of Justice in the fundamental rights context to discern a "Union" standard based on the "constitutional traditions common to the laws of the Member States"[124] and the leeway given to a particular national standard or constitutional tradition.

Yet, even where the Charter is deemed applicable, this does not exclude the viability of national constitutional traditions. With respect to the scope and interpretation of the rights and principles enshrined in the Charter, Article 52 states: "In so far as this Charter recognises fundamental rights as they result from the constitutional

118. 561 U.S. 742 (2010).
119. 555 U.S. 353 (2009).
120. Charter, *supra* note 7, pmbl. ¶ 5.
121. *See, e.g.*, Koen Lenaerts & José A. Gutiérrez-Fons, *The Place of the Charter in the EU Constitutional Edifice*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 1559 (Steve Peers et al. eds., 2014); Michael Dougan, *Judicial Review of Member State Action Under the General Principles and the Charter: Defining the "Scope of Union Law"*, 52 COMMON MKT. L. REV. 1201 (2015) and citations therein.
122. Case C-34/09, Ruiz Zambrano v. Office national de l'emploi, Opinion of Advocate General Sharpston, 2011 E.C.R. I-1177, 1229 (¶¶ 171–73).
123. Charter, *supra* note 7, art. 51(1); *see* Case C-617/10, Åklagaren v. Åkerberg Fransson, EUR-Lex CELEX 62010CJ0617, ¶¶ 17–23 (Feb. 26, 2013).
124. TEU, *supra* note 1, art. 6(3) ("Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.").

traditions common to the Member States, those rights shall be interpreted in harmony with those traditions."[125]

Recently, for example, *Delvigne*[126] turned on the application of the Charter (*in casu* the right to vote and to stand as a candidate in elections to the European Parliament, as guaranteed by Article 39(2), and the principle of legality and proportionality of criminal offenses and penalties, as enshrined in Article 49) to national legislation providing for a person's permanent deprivation of civil and political rights, including the rights to vote and stand for election, upon conviction of a serious criminal offense.[127]

In its judgment, the Court held that it had jurisdiction to assess the compatibility of the national legislation concerned.[128] "Admittedly," the Court noted, "Articles 1(3) and 8 of the 1976 Act Concerning the Election of the Members of the European Parliament by Direct Universal Suffrage[129] do not define expressly and precisely who are to be entitled to that right, and . . . therefore, as EU law currently stands, the definition of the persons entitled to exercise that right falls within the competence of each Member State in compliance with EU law."[130] However, the Court continued,

> the Member States are bound, when exercising that competence, by the obligation in Article 1(3) of the 1976 Act, read in conjunction with Article 14(3) [of the Treaty on European Union (TEU)],[131] to ensure that the election of Members of the European Parliament is by direct universal suffrage and free and secret.
>
> Consequently, a Member State which, in implementing its obligation under Article 14(3) TEU and Article 1(3) of the 1976 Act, makes provision in its national legislation for those entitled to vote in elections to the European Parliament to exclude Union citizens . . . convicted of a criminal offence . . . must be considered to be implementing EU law within the meaning of Article 51(1) of the Charter.[132]

The Court concluded that Articles 39(2) and 49 of the Charter do not preclude national legislation such as that at issue, since the limitations on the exercise of those fundamental rights imposed by that legislation satisfied the requirements of Article 52(1) of the Charter, that is

125. Charter, *supra* note 7, art. 52(4).

126. Case C-650/13, Delvigne v. Commune de Lesparre-Médoc, EUR-Lex CELEX 62013CJ0650 (Oct. 6, 2015).

127. *Id.* ¶¶ 14–20.

128. *Id.* ¶ 34.

129. Annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, 1976 O.J. (L 278) 1, as amended by Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002, 2002 O.J. (L 283) 1.

130. Case C-650/13, *Delvigne*, ¶ 31.

131. TEU, *supra* note 1, art. 14(3) ("The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.").

132. Case C-650/13, *Delvigne*, ¶¶ 32–33.

to say, they were provided by law, respected the essence of those rights, and complied with the principle of proportionality.[133] In his opinion, Advocate General Cruz Villalón engaged in a comparative law analysis in the context of the proportionality assessment, finding that member states may provide that a criminal conviction is grounds for deprivation of the right to vote without such a provision being incompatible with EU law.[134] In this way, the Court's judgment may be viewed as being in harmony with the approaches taken in the member states.

Moreover, regarding the level of protection, Article 53 states that nothing in the Charter "shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms" as recognized by, *inter alia*, the member states' constitutions.[135] Arguably, Article 53 represents an expression of "constitutional pluralism" in the sense that the Court defers to the member states the question of determining the level of protection of fundamental rights consistent with their national constitution, provided that the Union's essential interests are not adversely affected,[136] as recently confirmed in *Melloni*.[137]

B. Echoes of McDonald v. Chicago

The U.S. Supreme Court grappled with similar issues related to the incorporation doctrine in *McDonald v. Chicago*.[138] There, it held that the Fourteenth Amendment incorporates the Second Amendment[139] right, recognized in *District of Columbia v. Heller*,[140] to keep and bear arms for the purpose of self-defense and thus is fully applicable to the states.[141] As a result, the city ordinances in

133. *Id.* ¶¶ 44–58.

134. *Id.*, Opinion of Advocate General Cruz Villalón, EUR-Lex CELEX 62013CC0650, ¶¶ 117–20 (June 4, 2015) (noting the wide variation among the laws of the member states, which were "so diverse that, from the point of view of EU law, regard may be had only to the common minimum shared by the Member States" and thus to the case law of the European Court of Human Rights).

135. Charter, *supra* note 7, art. 53.

136. Koen Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, 8 Eur. Const. L. Rev. 375, 397–99 (2012) and citations therein.

137. Case C-399/11, Melloni v. Ministerio Fiscal, EUR-Lex CELEX 62011CJ0399, ¶ 60 (Feb. 26, 2013).

138. 561 U.S. 742 (2010).

139. U.S. Const. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

140. 554 U.S. 570 (2008).

141. Justice Alito delivered the opinion of the Court. A majority (Chief Justice Roberts and Justices Alito, Kennedy, Scalia, and Thomas) held that the Second Amendment was incorporated against the states, but only a plurality (Chief Justice Roberts and Justices Alito, Kennedy, and Scalia) held that it was incorporated through the Fourteenth Amendment's Due Process Clause. Justice Scalia filed a concurring opinion; Justice Thomas filed an opinion concurring in part and concurring in the judgment; Justices Stevens and Breyer filed dissenting opinions, the latter joined by Justices Ginsburg and Sotomayor. For detailed discussion, see, e.g., Case Comment, *Fourteenth Amendment—Incorporation of the Right to Keep and Bear Arms*, 124 Harv. L. Rev. 229 (2010); Symposium, *Gun Control and the Second Amendment: Developments and Controversies in the Wake of* District of Columbia v. Heller *and* McDonald v. Chicago, 39 Fordham Urb. L.J. 1339 (2012).

question, banning handgun possession among private citizens, were held to be unconstitutional.[142]

After tracing the development of the incorporation doctrine in the Supreme Court's case law,[143] a plurality of the Court[144] held that the right at issue satisfied the standards set down therein for incorporation under the Fourteenth Amendment's Due Process Clause.[145] In doing so, it rejected arguments for applying a different standard—namely that the clause protects only those rights "recognized by all temperate and civilized governments, from a deep and universal sense of [their] justice"—thereby prompting discussion of the laws of several foreign countries (including certain EU member states), as well as previous cases involving references to foreign and international law.[146] The plurality also rejected arguments that it should depart from its established incorporation methodology on the grounds that it is inconsistent with federalism and stifles state experimentation, underscoring that

> [u]nder our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values.[147]

In his dissenting opinion, Justice Stevens found that the rights protected by the Fourteenth Amendment's Due Process Clause need not be identical in shape or scope to the rights protected against federal government infringement by the various provisions of the Bill of Rights, and he considered legitimate reasons for holding states to different standards under certain circumstances.[148] He also considered that "the experience of other advanced democracies" undercut arguments in favor of incorporation under the Due Process Clause:

> The fact that our oldest allies have almost uniformly found it appropriate to regulate firearms extensively tends to weaken petitioners' submission that the right to possess a gun of one's choosing is fundamental to a life of liberty. While the "American perspective" must always be our focus, . . . it is silly—indeed, arrogant—to think we have nothing

142. The city ordinances were repealed following the Court's remand of the case. Nat'l Rifle Ass'n of Am. v. Chicago, 393 F. App'x. 390 (7th Cir. 2010). Yet, the Court's recent cases have not put an end to matters regarding gun control in the states. *See, e.g.*, Friedman v. Highland Park, 136 S. Ct. 447, 484–86. (2015) (Thomas, J., dissenting from the denial of certiorari).

143. *See McDonald*, 561 U.S. at 754–66. For background, see, e.g., LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 1293–1381 (3d ed. 2000).

144. *See supra* note 141.

145. *McDonald*, 561 U.S. at 767–78 and citations therein.

146. *Id.* at 780–82.

147. *Id.* at 784–85.

148. *Id.* at 866–70 (Stevens, J., dissenting).

to learn about liberty from the billions of people beyond our borders.[149]

C. Union Measures and the Standard of Review

The "constitutional traditions common to the Member States" may also figure in the European Court of Justice's review of the compatibility of Union measures with the Charter. For instance, in *Schrems*,[150] the Court received a reference for a preliminary ruling from the High Court of Ireland concerning the interpretation, in light of several provisions of the Charter, of Directive 95/46[151] on the protection of personal data and, in essence, the validity of a Commission decision[152] adopted pursuant to that Directive on the adequacy of the protection provided by the safe harbor privacy principles issued by the U.S. Department of Commerce.[153] The case stemmed from a complaint made by Mr. Schrems, an Austrian national, to the Data Protection Commissioner regarding the fact that Facebook Ireland transferred the personal data of its users to the United States, which allegedly did not ensure adequate protection of the personal data held on its territory against surveillance activities by public authorities.[154]

The referring court pointed out that the mass and undifferentiated accessing of personal data is contrary to the principle of proportionality and the fundamental values protected by the Irish Constitution.[155] As the case concerned the implementation of EU law within the meaning of the Charter and thus the decision in the main proceedings had to be assessed in light of EU law, it stressed that the right to respect for private life, guaranteed by Article 7 of the Charter and "by the core values common to the traditions of the Member States," would be rendered meaningless if the state authorities were allowed to access electronic communications on a casual and generalized basis without any objective justification based on considerations of national security or the prevention of crime specific

149. *Id.* at 895–96. *But see id.* at 800–01 (Scalia, J., concurring).

150. Case C-362/14, Schrems v. Data Prot. Comm'r, EUR-Lex CELEX 62014CJ0362 (Oct. 6, 2015).

151. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, as amended by Regulation (EC) No. 1882/2003 of the European Parliament and of the Council of 29 September 2003, 2003 O.J. (L 284) 1.

152. Commission Decision 2000/520/EC of 26 July 2000 Pursuant to Directive 95/46/EC of the European Parliament and of the Council on the Adequacy of the Protection Provided by the Safe Harbour Privacy Principles and Related Frequently Asked Questions Issued by the U.S. Department of Commerce, 2000 O.J. (L 215) 7.

153. Case C-362/14, *Schrems*, ¶ 67.

154. *Id.* ¶¶ 28–30. Incidentally, Mr. Schrems was inspired to bring the case by a privacy law seminar that he attended as part of his studies at the Santa Clara University School of Law in California. *See, e.g.*, Mary Ellen McIntire, *How a Law Seminar Inspired a Student to Bring a Case to Europe's Top Court*, CHRON. HIGHER EDUC. (Oct. 7, 2015) http://chronicle.com/article/How-a-Law-Seminar-Inspired-a/233682.

155. Case C-362/14, *Schrems*, ¶ 33.

to the individual concerned and without being accompanied by appropriate and verifiable safeguards.[156]

In its judgment, with regard to the legality of the Commission decision, the Court ruled—taking into account, first, the important role played by the protection of personal data in the light of the fundamental right to respect for private life and, secondly, the large number of persons whose fundamental rights are liable to be infringed where personal data are transferred to a third country not ensuring an adequate level of protection—that the Commission's discretion as to the adequacy of the level of protection ensured by a third country is reduced, with the result that review of the requirements flowing from Article 25 of Directive 95/46, read in the light of the Charter, should be "strict."[157] On that basis, it declared that the Commission decision failed to comply with the requirements in question and was therefore invalid.[158] Although not said outright, the Court's ruling in this case cast a comparative glance towards the standard of "strict scrutiny" employed in the American constitutional setting.[159]

This invites comparison with the U.S. Supreme Court's decision in *Ysursa v. Pocatello Education Association*.[160] That case, which was brought under the First Amendment's protection of freedom of speech,[161] concerned the constitutionality of a state law permitting employees to authorize payroll deductions for general union dues, but prohibiting such deductions for union political activities. The Court[162] upheld the state legislation on the grounds that it did not restrict political speech, but rather declined to promote that speech by allowing public employee checkoffs for political activities.[163] Given the finding that the state had not infringed the unions' First Amendment rights, it needed only to demonstrate on a rational basis standard, as opposed to strict scrutiny, that the ban on political payroll deductions was justified. Moreover, the same deferential review applied regardless of whether the ban was directed at state or local governmental entities.[164]

In his opinion, concurring in part and dissenting in part, Justice Breyer considered that there was a First Amendment interest at

156. *Id.* ¶ 34.

157. *Id.* ¶ 78 (citing by analogy Joined Cases C-293/12 & C-594/12, Dig. Rights Ireland Ltd. v. Minister for Commc'ns, Marine & Nat. Res., EUR-Lex CELEX 62012CJ0293, ¶¶ 47–48 (Apr. 8 2014)).

158. Case C-362/14, *Schrems*, ¶¶ 98,104–06.

159. *See in this regard* Siniša Rodin, *Constitutional Relevance of Foreign Court Decisions*, 64 Am. J. Comp. L. 815, 830 (2016).

160. 555 U.S. 353 (2009).

161. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

162. Chief Justice Roberts delivered the opinion of the Court, joined by Justices Scalia, Kennedy, Thomas, and Alito, and by Justice Ginsburg as to Parts I and III. Justice Ginsburg filed an opinion concurring in part and concurring in the judgment; Justice Breyer filed an opinion concurring in part and dissenting in part; Justices Stevens and Souter filed dissenting opinions.

163. *Ysursa*, 555 U.S. at 355, 359.

164. *Id.* at 359, 362.

stake, since the ban affected speech indirectly by restricting a channel through which speech-supporting finance could flow.[165] Yet, instead of applying either a strict scrutiny or rational basis review, he advocated an intermediate approach based on proportionality, as had been contemplated by the Court "in other speech-related contexts, namely, [asking] whether the statute imposes a burden upon speech that is disproportionate in light of the other interests the government seeks to achieve."[166] In this regard, he pointed out, "[c]onstitutional courts in other nations also have used similar approaches when facing somewhat similar problems," and cited the case law of several foreign countries (Canada, Israel, and South Africa) and the European Court of Human Rights, in which proportionality was applied in the context of campaign financing, freedom of the press, and freedom of expression.[167] Although Justice Breyer's opinion concerns the review of state, as opposed to federal, measures, it nevertheless highlights some remarkable parallels in the standards of review of the European Court of Justice and the U.S. Supreme Court in fundamental rights adjudication.

Conclusion

As the foregoing discussion has shown, the comparative law method is an essential tool of the European Court of Justice that helps to make EU law operational in the legal orders of the member states and enables it to evolve in light of the legal and social developments taking place at the Union and national levels on numerous fronts. Yet, as illustrated by the cases mentioned above, recourse to comparative analysis often implicates delicate issues relating to the limits and legitimacy of the judicial function vis-à-vis the constituent states and the legislature/political process in the European and American settings. Although the circumstances before the European Court of Justice and the U.S. Supreme Court in these cases are different, they nonetheless attest to similar challenges facing each Court in the context of constitutional adjudication and provide interesting insights into how the Courts carry out their mandates under their respective constitutional charters.

165. *Id.* at 367 (Breyer, J., concurring in part and dissenting in part).

166. *Id.* This has been reiterated in subsequent case law—*see, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2551–52 (2012) (Breyer, J., concurring)—though so far without reference to foreign and international law. For a broader discussion, see, e.g., Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 Yale L.J. 3094 (2015).

167. *Ysursa*, 555 U.S. at 367 (Breyer, J., concurring in part and dissenting in part).